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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Wesco Insurance Company,

10 Plaintiff,

11 v.

12 AAA Cab Service Incorporated, et al.,

13 Defendants.
14

No. CV-17-01523-PHX-DLR

ORDER

15
16 Atain Specialty Insurance Company (“Atain”), Wesco Insurance Company
17 (“Wesco”), and Scottsdale Indemnity Company’s (“Scottsdale”) are insurance companies
18 now before the Court trying to determine who owes what to whom in the aftermath of
19 Antonio Graciano’s death. Those underlying facts are recited in the Court’s March 3, 2021
20 order. (Doc. 183.) Relevant here, however, is the Court’s September 30, 2019 order
21 concluding that Wesco had no duty to defend its insureds for the cause of Mr. Graciano’s
22 death. (Doc. 116.) After that order, Wesco filed a third amended complaint to pursue
23 reimbursement for payments it made in defense of its insureds, alleging three claims
24 against Atain and Scottsdale: equitable indemnification, equitable subrogation, and
25 contribution. (Doc. 152.) Atain and Scottsdale filed motions for summary judgment, and
26 Wesco countered with its own. (Docs. 196, 199, 208.) The motions are fully briefed.
27 (Docs. 198, 200, 204, 206, 209, 210.) For the following reasons, the Court grants Atain
28 and Scottsdale’s motions and denies Wesco’s motion.

1 I. Legal Standard

2 Summary judgment is appropriate when there is no genuine dispute as to any
 3 material fact and, viewing those facts in a light most favorable to the nonmoving party, the
 4 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material
 5 if it might affect the outcome of the case, and a dispute is genuine if a reasonable jury could
 6 find for the nonmoving party based on the competing evidence. *Anderson v. Liberty Lobby,*
 7 *Inc.*, 477 U.S. 242, 248 (1986). Summary judgment may also be entered “against a party
 8 who fails to make a showing sufficient to establish the existence of an element essential to
 9 that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*
 10 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

11 II. Discussion

12 A. Equitable Indemnification

13 In its first claim, Wesco seeks to recover amounts it contributed to settle the
 14 Underlying Litigation under an equitable indemnification theory. (Doc. 152 at 7.) “In
 15 Arizona, the plaintiff in a common law indemnity action generally must show: (1) it
 16 discharged a legal obligation owed to a third party; (2) for which the indemnity defendant
 17 was also liable; and (3) as between the two, the obligation should have been discharged by
 18 the indemnity defendant.” *KnightBrook Ins. Co. v. Payless Car Rental Sys. Inc.*, 409 P.3d
 19 293, 295 (2018) (cleaned up). Notably, the plaintiff must have an “actual obligation” to
 20 the third party to sustain an equitable indemnity claim. *Id.* at 296. The Arizona Supreme
 21 Court explicitly excludes a “supposed obligation” as grounds for an equitable indemnity
 22 claim. *Id.*

23 Here, Wesco cannot show that it discharged an actual obligation. To the contrary,
 24 Wesco previously sought and the Court previously granted a declaration that Wesco had
 25 “no duty to defend or indemnify its insured.” (Doc. 116 at 8.) As the Arizona Supreme
 26 Court notes, nothing less than an actual obligation can propel an equitable indemnity
 27 action. *KnightBrook*, 409 P.3d at 296. Atain and Scottsdale are entitled to judgment as a
 28 matter of law.

1 **B. Equitable Subrogation**

2 Recovery under an equitable subrogation theory requires, among other things, that
 3 the plaintiff be obliged to defend the insured. *See National Indem. Co. v. St. Paul Ins. Co.*,
 4 724 P.2d 544, 545 (Ariz. 1986). “Any legal or moral obligation to pay” or “an agreement
 5 for subrogation or an assignment of the debt” can ground that duty to pay. Even “a
 6 potentially covered claim” can create a duty to pay. *James River Ins. Co. v. Schenk*, No.
 7 CV-05-1213-PHX-FJM, 2006 WL 798700, at *1 (D. Ariz. Mar. 28, 2006) (citing
 8 *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 466 (Cal. 2005)) (emphasis added). But
 9 a claim that is not even potentially covered does not create a duty to defend. *See Scottsdale*,
 10 115 P.3d at 466.¹ Absent such a duty, an insurer who nevertheless defends the insured is
 11 a volunteer and “is not entitled to subrogation.” *Sourcecorp, Inc. v. Norcutt*, 258 P.3d 281,
 12 287 (Ariz. Ct. App. 2011), (2012) (quoting *Mosher v. Conway*, 46 P.2d 110, 114 (Ariz.
 13 1935).

14 This Court has already ruled that “the Underlying Action did not allege even the
 15 potential for coverage.” (Doc. 183.) Wesco never had a duty to defend its insured and
 16 therefore made payments as a mere volunteer. It is not entitled to subrogation. Atain and
 17 Scottsdale are entitled to judgment on claim two.

18 **C. Contribution**

19 Wesco presses its third claim, contribution, only against Atain. Arizona law
 20 requires, among other things, that a contribution plaintiff show it and the contribution
 21 defendant insured the same risk. *Am. Cont’l Ins. Co. v. Am. Cas. Co. of Reading, Pa.*, 903
 22 P.3d 609, 611 (Ariz. Ct. App. 1995); *see also Cont’l Cas. Co. v. Signal Ins. Co.*, 580 P. 2d
 23 372, 374 (Ariz. Ct. App. 1978) (“In order for there to be contribution among insurers, the
 24 interest, as well as the risk and the subject matter, must be identical.” (citing *Great West*
 25 *Casualty Company v. Truck Ins. Exchange*, 358 F.2d 883, 886 (10th Cir. 1966))). It is
 26 undisputed that Wesco insured commercial auto risks and that Atain insured against

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 28 ¹ *Scottsdale* is a California decision, but it was cited favorably by this Court in *James River* and both parties have argued in previous filings that *Scottsdale* supports their positions.

1 “‘bodily injury’ or ‘property damage’ to which this insurance applies,” essentially
2 commercial general liability coverage. Because they did not insure the same risks, Wesco’s
3 contribution claim against Atain fails as a matter of law.

4 **III. Conclusion**

5 Wesco’s three claims fail as a matter of law. Therefore,

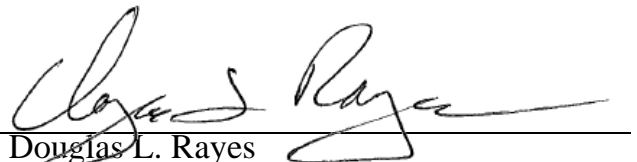
6 **IT IS ORDERED** that Atain Specialty Insurance Company’s and Scottsdale
7 Indemnity Company’s motions for summary judgment (Docs. 196 and 208) are
8 **GRANTED**.

9 **IT IS FURTHER ORDERED** that Wesco Insurance Company’s motion for
10 summary judgment (Doc. 199) is **DENIED**.

11 **IT IS FURTHER ORDERED** that, within **14 days** of the date of this order, the
12 parties submit a joint status report apprising the Court of the status of this litigation in light
13 of this order.

14 Dated this 18th day of March, 2022.

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Douglas L. Rayes
United States District Judge